

File



Before The
State Of Wisconsin
DIVISION OF HEARINGS AND APPEALS

Application of Jeff Slavik for a Permit to Extend a
Breakwall on the Bed of Green Bay, City of
Sturgeon Bay, Door County, Wisconsin

Case No. 3-LM-96-503

FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

Jeff Slavik, 1325 North 3rd Street, Sturgeon Bay, Wisconsin, 54235, applied to the Department of Natural Resources for a permit to place a structure on the bed of Sturgeon Bay. The proposed rubble mound breakwall will be 265 feet long by 25 feet wide at the bottom and 6 feet wide at the top. The project is located in Government Lot 4, in the NW 1/4, SE 1/4, Section 3, Township 28 North, Range 26 East, City of Sturgeon Bay, Door County, Wisconsin.

The Department of Natural Resources issued a Notice of Proposed Structure which stated that unless written objection was made within 30 days of publication of the Notice, the Department might issue a decision on the permit without a hearing. The Department did receive several timely objections.

On November 4, 1998, the Department filed a Request for Hearing with the Division of Hearings and Appeals.

Pursuant to due notice hearing was held on January 5, 1999, at Sturgeon Bay, Wisconsin, Jeffrey D. Boldt, administrative law judge, presiding.

In accordance with secs. 227.47 and 227.53(1)(c), Stats., the PARTIES to this proceeding are certified as follows:

Wisconsin Department of Natural Resources, by

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Jeff Slavik
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FINDINGS OF FACT

1. Dr. Jeff Slavik, 1325 North 3rd Street, Sturgeon Bay, Wisconsin, 54325, completed filing an application with the Department for a permit under sec. 30.12, Stats., to place a structure on the bed of Green Bay, City of Sturgeon Bay, Door County. The Department and the applicant have fulfilled all procedural requirements of secs. 30.12 and 30.02, Stats.

2. The applicant owns real property located in the Government Lot 4 in the NW $\frac{1}{4}$, SE $\frac{1}{4}$, in Section 3, Township 28 North, Range 26 East, Door County. The above-described property abuts the Sturgeon Bay area of Green Bay (the Bay) which is navigable in fact at the project site.

3. The applicant proposes to construct an extension to an existing rubblemound breakwall groin. The existing groin is 65 to 70 feet waterward to the ordinary highwater mark. (OHWM) The proposed extension would be 265 feet long and 30 to 35 feet wide at the bottom, tapering to six feet wide at the top.

4. The purpose of the project, as stated on the permit application, is to provide "a safe harbor, help prevent shoreline erosion and make waterway safe by building on (an) existing breakwall to bring it above the water line." (Ex. 1) The applicant also wants to maintain and enhance the existing sand beach at the project site.

5. The proposed structure would materially obstruct existing navigation on Sturgeon Bay and would be detrimental to the public interest in navigable waters. The structure is excessive in length and would disrupt the navigational pattern of small craft operations, by requiring them to navigate much farther out into the dangerous waters of the Bay. (Duperrault) The applicant owns approximately 100 feet of riparian frontage and the expanded groin would

extend 330 feet into the Bay. Such a structure would exceed the "reasonable use" of this property.

6. The applicant has not provided sufficient design specifications to ensure that the proposed groin would withstand the force of water, ice, wind and waves in Green Bay. (Stitgen) DNR Engineer Dean Stitgen provided unrebutted expert engineering testimony that the proposal did not provide a sufficient basis upon which to gauge the structural stability of the groin to a reasonable degree of engineering certainty. Specifically, the applicant has not carried his burden of showing how placement of this structure relates to bottom elevations and low water datum, nor whether minimal design standards will be met to ensure structural stability based upon wave and ice action. (Stitgen; Ex. 19) The implications of an unstable groin structure 335 feet out into the waters of the Bay create an unacceptable risk to navigational safety in the area. (Id.)

7. The proposed project would have a detrimental impact upon neighboring riparians, by contributing to erosion down-drift of the proposed structure and to accretion updrift. (Stitgen) The Department of Natural Resources undertook an Environmental Assessment (EA) of numerous solid pier applications on Sturgeon Bay and Green Bay in Door County. (Ex. 7) The EA made an extensive review of existing solid pier structures and of the scientific literature relating to solid piers in general and groin structures in particular. The EA concluded that, "(d)ecreased sediment transport and sediment accumulation against solid piers are potential consequences of blocking longshore currents and littoral drift. If beaches are robbed of their sediment supply, the beaches erode and the land behind the beaches may erode" (Id., p. 33) Further, "... the extent of accretion can be significant. As such, great care must be taken to protect neighboring properties from accretion activities caused by solid pier structures." (Id., p. 39) Further, the DNR presented evidence that the structure would impact an area of shoreline four to five times its length. (Ex. 26) The applicant has not carried his burden of proof in demonstrating that the proposed groin extension would not have a detrimental impact upon neighboring riparian properties.

8. The proposed project would have a detrimental impact on native shoreline vegetation and would aid in the proliferation of undesirable exotic species, including Eurasian water milfoil. (Rasman) DNR Water Quality Specialist Timothy Rasman provided undisputed expert testimony that the groin would create an obstacle to the longshore current that carries the littoral drift, and other sedimentary material moved within the littoral zone under the influence of waves and currents. The groin structure has a significant impact as to where the drift material is deposited. Increased updrift deposition activity would detrimentally impact aquatic vegetation by not allowing desirable plant species to establish themselves. The entire balance of the littoral zone ecosystem would be detrimentally impacted, particularly macroinvertebrates. Downdrift of the project, Rasman opined that scouring would lead to a proliferation of Eurasian water milfoil. Further, downdrift deposition of soft organic matter would lead to a rapid spread of this exotic plant species.

9. The increased deposition of sediment would lead to a constant "transition" state north of the proposed groin expansion, and would detrimentally impact native mussel species. The groin structure itself would likely have a detrimental impact upon the public waters by

creating an ideal launching habitat for the proliferation of zebra mussels. (Rasman) This would also create an unacceptable risk to desirable native mollusks, which zebra mussels tend to out-compete. (Id.)

10. The applicant has not carried his burden of demonstrating that the entire groin structure will fall within his riparian zone. (Ex. 17)

11. The proposed groin would have a detrimental impact on natural scenic beauty. Numerous witnesses testified that extension of the groin so far out in the Bay would impair their view of the natural beauty of the water.

12. The applicant is financially capable of constructing, maintaining, monitoring or removing the structure if it should be found in the public interest to do so.

13. The proposed structure will not reduce the effective flood flow capacity of the Sturgeon Bay (Green Bay).

14. The applicant has not carried his burden of proof in demonstrating that the proposed structure would not adversely affect water quality in Green Bay (Sturgeon Bay).

15. The proposed project would likely have detrimental cumulative impacts to public rights in public waters. The detrimental cumulative impacts are described at length in the EA, and chart the detrimental impacts described above.

16. The Department of Natural Resources has made an environmental assessment of the proposed project and related solid pier projects and determined that the grant or denial of the permit requested does not constitute a major state action significantly affecting the quality of the human environment. (Ex. 7)

DISCUSSION

The applicant for a sec. 30.12, Stats., permit bears the burden of proving that placement of the structure on the bed of a public waterway is "not detrimental to the public interest" in said waters. The determination of the public interest involves the balancing of the rights of a private riparian with the rights of the public in the waters held in public trust. In this case, there was substantial evidence that the proposed groin would be detrimental to public rights, the rights of neighboring riparians and would be excessive in size for the purposes stated by the applicant. Based in large part on the substantial amount of unrebutted expert testimony, the permit application must be denied.

CONCLUSIONS OF LAW

1. The applicant is a riparian owner within the meaning of sec. 30.12, Stats.

2. The proposed facility described in the Findings of Fact constitutes a structure within the meaning of sec. 30.12, Stats.

3. The Division of Hearings and Appeals has authority under secs 30.12 and 227.43(1)(b), Stats., and in accordance with the foregoing Findings of Fact, to issue or deny a permit for the construction and maintenance of said structure subject to any conditions specified.

4. The project is a type III action under sec. NR 150.03(8)(f)4, Wis. Admin. Code. Type III actions do not require the preparation of a formal environmental impact statement.

5. Specific structures may be determined to be "detrimental to the public interest" within the meaning of sec. 30.12(2), Stats., on the ground that they impair natural scenic beauty. This is a proper basis for denial of a permit. Claflin v. DNR, 58 Wis.2d 182, 206 N.W2d 392 (1973). The proposed project would be detrimental to the public interest in natural scenic beauty.

6. The applicant for a Chapter 30, Stats., permit has the burden of proof that the project will meet the standards in sec. 30.12(2), Stats., Village of Menomonee Falls v. DNR, 140 Wis.2d 579, 605, 412 N.W2d 505 (Wis. Ct. App. 1987). The applicant has not carried his burden of showing that the proposed breakwater expansion project would be not detrimental to the public interest in navigable waters.

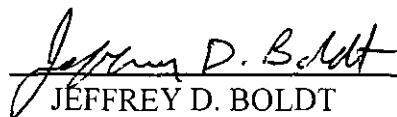
ORDER

WHEREFORE, IT IS HEREBY ORDERED, that the permit application be DENIED.

Dated at Madison, Wisconsin on January 19, 1999.

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DIVISION OF HEARINGS AND APPEALS
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By



JEFFREY D. BOLDT
ADMINISTRATIVE LAW JUDGE

NOTICE

Set out below is a list of alternative methods available to persons who may desire to obtain review of the attached decision of the Administrative Law Judge. This notice is provided to insure compliance with sec. 227.48, Stats., and sets out the rights of any party to this proceeding to petition for rehearing and administrative or judicial review of an adverse decision.

1. Any party to this proceeding adversely affected by the decision attached hereto has the right within twenty (20) days after entry of the decision, to petition the secretary of the Department of Natural Resources for review of the decision as provided by Wisconsin Administrative Code NR 2.20. A petition for review under this section is not a prerequisite for judicial review under secs. 227.52 and 227.53, Stats.

2. Any person aggrieved by the attached order may within twenty (20) days after service of such order or decision file with the Department of Natural Resources a written petition for rehearing pursuant to sec. 227.49, Stats. Rehearing may only be granted for those reasons set out in sec. 227.49(3), Stats. A petition under this section is not a prerequisite for judicial review under secs. 227.52 and 227.53, Stats.

3. Any person aggrieved by the attached decision which adversely affects the substantial interests of such person by action or inaction, affirmative or negative in form is entitled to judicial review by filing a petition therefor in accordance with the provisions of sec. 227.52 and 227.53, Stats. Said petition must be filed within thirty (30) days after service of the agency decision sought to be reviewed. If a rehearing is requested as noted in paragraph (2) above, any party seeking judicial review shall serve and file a petition for review within thirty (30) days after service of the order disposing of the rehearing application or within thirty (30) days after final disposition by operation of law. Since the decision of the Administrative Law Judge in the attached order is by law a decision of the Department of Natural Resources, any petition for judicial review shall name the Department of Natural Resources as the respondent. Persons desiring to file for judicial review are advised to closely examine all provisions of secs. 227.52 and 227.53, Stats., to insure strict compliance with all its requirements.